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EXHIBIT 5
DATE 3/17/09
SB 437

MEMORANDUM

OPPOSITION TO SB 437

I oppose SB 437 because the proposed change to M.C.A. § 87-4-603 will not improve fisheries or protect water. However, the passage of SB 437 will impair private property rights for current fish pond licensees and encourage unregulated fish ponds. I have worked in water right adjudication and permitting in the public and private sectors since 1977 and the reasons for my opposition to SB 437 are set forth below.

The passage of SB 437 will encourage "bucket biology" for existing ponds.

- A license holder for a private fish pond will not be able to renew a license for an existing pond upon expiration (every 10 years).
- Since fish pond licenses are not transferable, a new land owner will not be able to get a license for the fish pond when property is sold.

It is important to note that the issuance or re-issuance of a fish pond license does not effect the presence of a fish pond. According to M.C.A. § 87-4-603, the purpose of the fish pond license is to allow the holder of the license to obtain fish from a lawful source. (Emphasis added.) DFWP may designate the species of fish that may be released in the pond and otherwise condition the license if there is a possibility of fish escaping from the pond into adjacent streams or lakes. The law also provides that agents of DFWP can enter upon the land of a license holder to purposes of inspecting the pond or the body of water, the species of fish in the pond or the body of water, the presence of disease in a fish species, the construction of any impoundment, dam, or fish barrier, and the physical connection of an artificial lake or pond to an adjacent natural lake, pond, or body of water, including a stream or river.

If SB 437 passes, existing fish ponds using water from an exempt ground water source will simply become unregulated fish ponds. The owner will be unable to obtain fish from a lawful source. DFWP will probably need a warrant to enter property and inspect fish ponds.

The passage of SB 437 will encourage "bucket biology" for new ponds.

SB 437 does not prohibit the using ground water exempt from permitting to build a pond for stock water, recreation or any other beneficial purpose. The law simply keeps the owner from lawfully purchasing disease-free fish under DFWP supervision.

Singling out the use of water for fish ponds from other water uses serves no purpose.

Water evaporates from a pond at the same rate it evaporates from an irrigated field of the same size. The difference between a pond used for irrigation and one used for fish is that the crop in the field uses water in addition to evaporation while the only water consumed by a fish pond is consumed by evaporation. Similarly, water will evaporate from a stock pond and a fish pond at the same rate. Again, the stock pond uses more water than the fish pond because of the amount of water consumed by stock. Therefore, the passage of SB 437 will not protect water resources.

The passage of SB 437 will impair private property rights.

As noted above, the current owner of a fish pond license built with water from exempt groundwater will not be able to renew that license regardless of whether the owner has invested substantial sums of money to construct and maintain a healthy environment for fish and has complied with all applicable laws and regulations. Many areas in the state are in closed basins, making it impossible or prohibitively expensive to get a permit to appropriate water to supply a fish pond, a permit that is not necessary for any other use of ground water under 35 gpm and 10 acre-feet per year.

The passage of SB 437 will hurt small Montana businesses.

The majority of the companies supplying labor and material to build ponds, the fisheries providing the stock for the ponds and the fishery biologists and water rights consultants who work with pond owners either own or work for small Montana companies. Their customers are generally out-of-state landowners. SB 437 could cause a substantial decrease in business to these companies during this difficult economic time.

Please oppose SB 437. Thank you.

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